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In the

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1077

AMES NOWELL,

Petitioner,

v.

IRIS CALDER NOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1967.

No. .....

AMES NOWELL,

Petitioner,

v.

IRIS CALDER NOWELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review a judgement of the United States Court of Appeals for the Fifth Circuit entered in the above entitled action on November 7, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on November 7, 1967, is printed as Appendix A hereto. The judgement of the United States

District Court for the Northern District of Texas, Dallas Division, entered on the 14th day of December, 1966, is printed in the Record at page 21. The order of said District Court overruling Petitioner's motion to quash service of process, entered on the 1st day of November, 1966, is printed in the Record at page 17. No opinion was written by the District Court in overruling the motion or in rendering judgement.

JURISDICTION

The judgement of the United States Court of Appeals for the Fifth Circuit was entered on November 7, 1967. This judgement affirmed the decision of the United States District Court at Dallas, Texas, in which the petitioner appeared as defendant and moved that service be quashed on the ground that there had been no compliance with Rule 4(d)(1), Federal Rules of Civil Procedure. The District Court denied this motion. Since no further appearance was made by the defendant below, the plaintiff sought and obtained a default judgment on the 14th day of December, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The questions presented for review are:

(1) Whether delivery of a summons at the apartment of the manager of two unconnected apartment buildings, which buildings are separted by an alley and have different street addresses, constitutes the service of the summons at the usual place of abode of the named defendant under Rule

4(d) (1) of the Federal Rules of Civil Procedure where it appears that the defendant dwelled in an apartment in the other building located on a different street, where the manager had never met the defendant, did not know him and did not deliver the summons to him, he being absent at the time?

(2) Whether notice of the suit on the part of the defendant sometime subsequent to attempted service of process warrants the Court in construing Rule 4(d) (1) in such a manner as to find valid service of process when there has not been compliance with the requirements of the rule?

STATUTE INVOLVED

This petition involves the issue whether the substituted service attempted in this case complies with the requirements of Rule 4(d) (1) of the Federal Rules of Civil Procedure, which provides that:

> Rule 4(d): " * * * Service shall be made as follows:
>
> "(1) Upon an individual * * * by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * * ."

STATEMENT OF THE CASE

The respondent instituted this suit against the petitioner, her former husband, in the United States District Court at Dallas, Texas. The suit sought enforcement of a claim of $18,500.00 placed on two property settlement agreements which the parties had executed. Attempted service upon the petitioner was had by delivering a copy of the summons

and complaint to Mrs. Dorothy Kimbriel, who was the resident manager of the Maricaibo Apartments in Dallas. The Maricaibo was an apartment complex consisting of 63 units in two unconnected buildings, separated by an alley. The buildings had different addresses as they fronted on different streets. Mrs. Kimbriel, who had never met the petitioner at the time of service, resided in one of the buildings and the petitioner resided alone in the other. The only contract between the resident manager and the petitioner prior to the attempted service was that the former received the latter's rent by mail.

After Mrs. Kimbriel received the summons, she forwarded it by mail to an address in New York. Subsequently, the petitioner appeared in the District Court by his attorney and moved that the purported service be quashed on the ground that there had been no compliance with Rule 4(d) (1). This motion was denied. As the petitioner made no further appearance, the respondent sought and obtained a default judgment.

The decision of the District Court was duly appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals in its opinion entered on November 7, 1967, affirmed the judgment of the District Court. The petitioner timely filed this petition in the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court.

ASSERTION OF THE QUESTIONS PRESENTED IN THE COURTS BELOW.

The respondent filed her action in the District Court at Dallas on February 17, 1966, being Cause No. CA-3-1394. Service was then attempted upon petitioner by delivering a copy of the summons and complaint to Mrs. Dorothy Kimbriel, as hereinabove set out. The petitioner then appeared and timely filed his motion to quash service of summons. This motion was denied. As the petitioner made no further appearance, respondent sought and obtained a default judgment from the District Court. The petitioner timely filed his appeal to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has destroyed the requirements of Rule 4(d)(1) where the defendant has actual notice of suit.

2. Rule 4(d)(1) requiring proper service is fundamental and adequate guidelines should be laid down by the Supreme Court.

3. Petitioner has been unjustly subjected to a judgment without being served as provided by the Rule.

The Court of Appeals, in essence, has stated the following proposition of law in its opinion: Where defendant has actual notice of the suit, Rule 4(d)(1) may be so liberally construed as to hold the service valid even though the necessary requirements for service stated in the Rule have not

been followed. This proposition is not and cannot be an accurate statement of the law. A defendant, if he had actual notice, would properly be before the court notwithstanding any type or form of attempted service of process. Actual notice would be controlling over valid service required by the Rule. The petitioner submits that the correct statement of the law concerning the construction of Rule 4(d) is: that where there is actual notice of the suit by defendant, the Federal Rules for service should be liberally construed, but "a substantial compliance with the Rules providing manner of service of summons is required and the courts are without authority to nullify the plain requirements of the rule." (See *Zuckerman v. McCully*, D.C. 7 F.R.D. 739)

In many cases the courts have held that, although the defendant has actual notice of the suit, there must be substantial compliance with the Rules.

In *Blane v. Young*, 10 F.R.D. 109, N.D. Ohio, 1950, service was made on defendant's father before a default judgment was entered. The defendant, who had actual notice, moved to quash service. The Court held that:

> "Rule 4(d)(1) should be liberally construed to effectuate service when actual notice of the suit has been received by defendant. If this ruling is followed literally, defendant has been properly served because he had actual notice of this action. However, the ruling cannot be divorced from the facts. . . . The undisputed evidence in this case . . . shows that the summons was not left at defendant's usual place of abode. Therefore, service was not made according to Rule 4(d)(1)."

The case of *Frasca v. Eubanks,* E.D. Penn. (1959) 24 F.R.D. 268 holds the fact of actual notice is *not* enough. There must be compliance with the plain directions of the rule; the terms "dwelling house" and "usual place of abode" cannot be given an artificial meaning.

The court in *Berner v. Farny,* D.N.J. (1951), 11 F.R.D. 506 wrote:

> "The statute prescribed the manner in which jurisdiction of the court over the person of a defendant may be obtained and the mere showing that he has had notice of the institution of the suit does not fulfill the requirements of the statute. Indeed, whenever a defendant comes into court to challenge the service of process he, of necessity, has received notice, *but clearly, mere notice is not a sufficient ground upon which a court can sustain the validity of service of process* * * *" *(emphasis ours)*

See also *M. Di Leo v. Shin Shu,* S.D. N.Y. (1961) 30 F.R.D. 56 at p. 58.

From the above cited cases it is evident that even though a defendant has actual notice of a suit and the Rules may be liberally construed, the rules still must be followed. The Fifth Court of Appeals has held otherwise. Therefore, for service to be upheld in this cause, the defendant must have been properly served by serving a proper individual at the former's "dwelling house" or "usual place of abode" as provided by Rule 4(d) (1). It is undisputed that this was not done.

Nowhere in the opinion of the Court of Appeals does the Court specifically state that service in this case was proper.

The Court simply states that the Rule must be "liberally construed."

The case of *Judson v. Judson*, D.C. (1943) 8 F.R.D. 336 held that where service was had on the resident manager of the apartment hotel, wherein the parties resided, there was not proper service under R. 4(d). The Court said that service upon a complete stranger who happened to live in the same building was not enough.

The Court of Appeals in its opinion stated that the case of *Di Leo v. Shin Shu*, S.D. N.Y. (1961) 30 F.R.D. 56 "is not controlling, as service in that case was left with another tenant rather than the landlord as in this appeal," and that a tenant would "more likely" receive notice from the landlord rather than another tenant. The Court fails to point out that the other tenant which was served was the daughter of the person being sued. The term "landlord" connotes a rooming house situation as stated in *Smith v. Kincaid*, 6 Cir. 1957, 249 F. 2d 243, in which the landlord appeared to live under the same roof and in the same group of rooms as the defendant (See annotation 14 L. Ed. 2d 733, at Page 752). In the case at bar, an apartment manager, not a "landlady," was served, and she did not live in the same building as petitioner or even on the same street. This is not and cannot be called service at his "dwelling house" or "usual place of abode."

The Court of Appeals also cites the cases of *Karlsson v. Rabinowitz*, 4 Cir. 1963, 318 F. 2d 666 and *Skidmore v. Green*, S.D. N.Y. 1940, 33 F. Supp. 529 in which adequate service was found by the Court. These cases are not con-

trolling. They present completely different fact situations, viz., service of process was made upon relatives of the defendants at the defendants' homes which were clearly "dwelling houses" and/or "usual places of abode." Attempted service here was *NOT* at the apartment (dwelling place) of defendant. In *Pickford v. Kravetz*, S.D. N.Y. (1952), 17 Fed. Rules Serv. 4d 121, case 1, substituted service was upheld where the manager of the hotel was served in which the defendant was temporarily residing. The hotel manager was a friend of the defendant, had control over the premises at the same address, and wrongfully connived with the defendants to avoid service. (See 2 Moore Federal Practice, Sec. 4.12; p. 1047). In the case at bar, the apartment manager had not ever met the defendant, and had no control or knowledge of his use of his apartment.

The petitioner submits that his "dwelling place" or "usual place of abode" does not extend to another building located upon another street, nor to an apartment manager who is *not* a landlady living within the same building or cluster of rooms i.e., living at defendant's "dwelling place."

The Court of Appeals points out that relief might be available to petitioner under Rule 60(b) of Federal Rules of Civil Procedure. "A defendant can obtain relief under 60(b) when a default judgment is entered 'after service of process' * * * sufficient to confer jurisdiction but of which the defendant had no actual notice without fault on his part * * *", 3 Barron and Holtzoff, Federal Practice and Procedure, Sec. 1325, p. 404. Under this Rule a completely different situation exists than in the case at bar. The rule

assumes proper service, usually constructive or substituted, of which a defendant never received the notice. Thus, before Rule 60(b) may be invoked, there must be valid service under the Rules of Civil Procedure. See *Williams v. Capital Transit Co.*, D.C. (1954) 215 F. 2d 487, *Huntington Cab Co. v. American Fidelity and Cas. Co.*, D.C. W.Va. 1945, 4 F.R.D. 496; *Ellington v. Milne*, D.C. N.C. (1953), 14 F.R.D. 241. Service of process not completed at the defendant's usual place of abode is ineffective. *Williams v. Capital Transit Co. supra.* Therefore, even under cases construing Rule 60(b), if the service was not properly made under Rule 4(d)(1), then the service is void and 60(b) does not cure the invalid service.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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In The

United States Court of Appeals

For the Fifth Circuit

AMES NOWELL,

Appellant,

Versus

IRIS CALDER NOWELL,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(November 7, 1967).

Before RIVES, GOLDBERG and AINSWORTH, Circuit Judges.

RIVES, Circuit Judge: The question presented on this appeal is whether the substituted service effected in this case complies with the requirements of Rule 4(d)(1) of the Federal Rules of Civil Procedure.[1]

The appellee instituted this suit against the appellant, her former husband, in the United States District Court at Dallas. The suit sought enforcement of a claim of $18,500

[1] Rule 4(d): "* * * Service shall be made as follows:

"(1) Upon an individual * * * by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein * * *."

based on two property settlement agreements which the parties had executed. Service upon the appellant was had by delivering a copy of the summons and complaint to Mrs. Dorothy Kimbriel who was the resident manager of the Maricaibo Apartments in Dallas. The Maricaibo was an apartment complex consisting of 63 units in two buildings separated by an alley. The buildings had different addresses as they fronted on different streets. Mrs. Kimbriel, who had never met the appellant at the time of service, resided in one of these buildings and the appellant resided alone in the other. The only contact between the resident manager and the appellant prior to service was that the former received the latter's rent. Shortly after Mrs. Kimbriel received the process, the appellant appeared in the district court by his attorney and moved that service be quashed on the theory that there had been no compliance with Rule 4(d) (1). This motion was denied. As the appellant made no further appearance, the appellee sought and obtained a default judgment.

It is settled that jurisdiction can be acquired over a defendant by leaving process with the landlady of the rooming house wherein the defendant resides. *Smith v. Kincaid*, 6 Cir. 1957, 249 F.2d 243. In a somewhat similar case, a New York district court held that service was adequate where process was left with the manager of a hotel where the defendant was temporarily staying. The court observed that the manager of the hotel was a resident of the defendant's

dwelling place, the hotel, within the requirements of Rule 4(d)(1), although the manager made his home elsewhere. *Pickford v. Kravetz*, S.D. N.Y. 1952, 17 Fed. Rules Serv. 4d.121,[2] Case 1. From reading the appellant's brief, the issue on appeal that implicitly arises may be stated as follows:

Whether the language in 4(d)(1) must be so narrowly construed that the adequacy of service turns upon whether the apartment manager resides in the same or a different building as the defendant.[3]

The appropriate construction of Rule 4(d)(1) varies according to whether the defendant received notice of the suit. 4(d)(1) should be broadly construed where the defendant, as in this case, received notice of the suit. This rule of construction is, of course, subject to the limitation that the construction of the statute's language must be a natural rather than an artificial one. *Frasca v. Eubank*, D.C. Pa. 1959, 24 F.R.D. 268. Otherwise, no hard and fast rule can be fashioned to determine what is or is not a party's "dwelling house or usual place of abode" within the rule's meaning; rather the practicalities of the particular fact

[2] Professor Moore points out that *Pickford, supra*, as authority for the validity of service in such a situation might be limited by the fact that the court felt that the manager and the defendant conspired to avoid service. 2 Moore Federal Practice, ¶ 4.12 (p. 1047).

[3] We, of course, can only speculate that the appellant would have agreed that substituted service upon a landlord occupying the same building would have been valid. But regardless, we hold that service under that situation is undoubtedly good, and now we must determine whether the fact that the resident manager and the defendant resided in separate buildings requires a different result.

situation determine whether service meets the requirements of 4(d) (1).

> "* * * the provision concerning usual place of abode should be liberally construed to effectuate service if actual notice has been received by the defendant and that in the last analysis the question of service must be resolved by 'what best serves to give notice to a defendant that he is being served with process, considering the situation from a practical standpoint.[55]

---

[55]* * * Rovinski v. Rowe, C.C.A. 6th 1942, 133 F.2d 687 [689] * * *."

1 Barron & Holtzoff, Federal Practice & Proceure §177, p. 666.

A brief analysis of several cases which have construed 4(d) (1) follows so that the facts of this appeal may be considered in context. In *Karlsson v. Rabinowitz*, 4 Cir. 1963, 318 F. 2d 666, process had been left with the defendant's wife at his house in Maryland where the defendant himself had lived prior to his having moved ahead of the family to Arizona. The court held that the service met the requirements of Rule 4(d) (1), although twenty days before service the defendant had left Maryland with the intention of permanently giving up his residence, never to return. The court expressly approved the liberal construction rule applicable when the defendant receives actual notice of the suit. "Additionally, the court emphasized that each case "proceeds on its own facts." *Karlsson, supra*, at 668. The

case of *Di Leo v. Shin Shu*, S.D. N.Y. 1961, 30 F.R.D. 56, is not controlling, as service in that case was left with another tenant rather than the landlord as in this appeal. The significance of this difference is that the substantial nexus that exists between tenant and landlord does not exist between tenants themselves. The landlord, unlike his tenants, has a degree of control over all tenants and the premises that each occupies. Also a tenant generally would be more likely to receive notice of a suit where process had been left with his landlord rather than another tenant. This too is a consideration in determining the validity of service under Rule 4(d)(1). 1 Barron & Holtzoff, Federal Practice & Procedure §177, p. 666. In *Skidmore v. Green*, S.D. N.Y. 1940, 33 F. Supp. 529, the defendant attacked the service which had been left at his brother's home in New York. The defendant had retired in 1937 and from that time until the car accident in Florida, in October 1939, which produced the suit, the defendant had lived most of the time in a house trailer traveling around the country. The court in upholding the service stated that the process "left at the home of the defendant's brother was left at the defendant's 'usual place of abode.'" *Skidmore, supra*, at 529. There is little if any evidence in the reported case, however, that from 1937 on the defendant actually resided with his brother and his wife in New York. The court apparently felt that it was crucial to its decision that in each year beginning with the 1937 purchase of the trailer, the defendant had put New York license plates on his car; and that he had used his brother's address in the license applications. The second

finding would appear to be the only one of signifiance and is easily explained in light of the defendant's migratory life. Nevertheless, that court held that the requirements of 4(d)(1) were met.

The above decisions, the relief available to a defendant under Rule 60(b) of the Federal Rules of Civil Procedure,[4] and the remedial purpose of Rule 4(d)(1) convince this Court that a liberal construction of the rule is required where the defendant had notice of the suit. The judgment is

AFFIRMED.

---

[4] A defendant can obtain relief under 60(b) when a default judgment is entered "after service of process * * * sufficient to confer jurisdiction but of which the defendant had no actual notice without fault on his part * * *." 3 Barron & Holtzoff, Federal Practice & Procedure §1325, p. 404.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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v.

IRIS CALDER NOWELL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1967

No. 1077

AMES NOWELL,

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v.

IRIS CALDER NOWELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 384 F. 2d 951. There was no opinion by the United States District Court for the Northern District of Texas, Dallas Division.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit pursuant to the provisions of 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented for review, as stated by the Court of Appeals, 384 F. 2d 951, 953 (see Petition, at p. A-3) is as follows:

> "Whether the language in (Rule) 4(d)(1) must be so narrowly construed that the adequacy of service turns upon whether the apartment manager (upon whom substituted service was made) resides in the same or a different building as the defendant."

STATUTE INVOLVED

The pertinent provision of the Federal Rules of Civil Procedure involved is set forth in the Petition at page 3.

STATEMENT OF THE CASE

On February 17, 1966, Respondent, the former wife of Petitioner, filed suit in the United States District Court for the Northern District of Texas, Dallas Division, to enforce the provisions of a separation agreement executed by the parties on December 11, 1956, and a post-divorce supplemental agreement dated March 22, 1957. The United States Marshal, having been unable to make personal service on Petitioner during a period of approximately four months, served him on June 15, 1966, as reflected in the return, by

delivering a copy of the summons and of the complaint to "Mrs. Dorothy Kimbriell, in person, Manager of the Maricabo (sic) Apts. his landlady, at the Apt. Bldg. where his place of abode is * * *" The record reveals that Petitioner lived alone at apartment 208 of the Maracaibo Apartments, an apartment complex consisting of sixty-three units in two buildings which are separated by an alley. Mrs. Dorothy Kimbriell was the resident manager of the Maracaibo Apartments on the date of service, although the apartment in which she resided was not located in the same building as Petitioner's apartment. Within the time prescribed by the Federal Rules of Civil Procedure, Petitioner appeared in the district court by his attorneys and filed a motion to quash service.

Petitioner's motion to quash was heard on September 16, 1966, and was overruled on November 1, 1966. The trial judge ordered Petitioner to serve his answer within ten days. Petitioner having failed to serve his answer within such time, the clerk entered his default pursuant to Rule 55(a) and promptly notified him that entry of default had been made. Application then was made by Respondent to the court for entry of judgment, and judgment was entered on December 14, 1966. Petitioner did not appear at the hearing on Respondent's motion for judgment, although notice of such hearing was duly served on his attorneys.

The decision of the district court was appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed, and Petitioner now seeks a writ of certiorari.

Two statements contained in Petitioner's Statement of the Case are incorrect and must be challenged. Petitioner states at page 4, that:

> "The only *contract* between the resident manager and the Petitioner prior to the attempted service was that the former received the latter's rent by mail." (Emphasis added)

This is an apparent typographical error, and "contract" should read "contact".

Petitioner also states, at page 4:

> "After Mrs. Kimbriell received the summons, she forwarded it by mail to an address in New York."

There is nothing in the record to support this statement. All that appears in the record is that Mrs. Kimbriell received the summons and that subsequently Petitioner appeared in the district court by his attorneys and moved that service be quashed.

ARGUMENT

The issue in this case is uniquely narrow and no amount of strained semantics can convert it into one warranting review by this Court on certiorari. As stated by the Court of Appeals in its opinion, the only question which it decided was whether Rule 4(d)(1) *must* be so narrowly construed that adequacy of service under such rule turns upon whether the apartment manager resides in the same building as the defendant or in a different one. All that the Court of Appeals holds is that the rule need not be thus narrowly construed—i.e., that there are circumstances under which serv-

ice upon a landlady or resident apartment house manager may satisfy the requirements of Rule 4(d)(1), even though she does not reside in the same building or apartment unit as the defendant. The court then found that the facts of this case met the requirements of Rule 4(d)(1) and overruled the motion to quash service.

I

The Decision Below is Clearly Correct

The Court of Appeals simply applied the well-established principle that Rule 4(d)(1) should be broadly construed to uphold service where the defendant actually has received notice of the suit, subject to the limitation that the construction of the rule must be a natural rather than an artificial one. *Rovinski v. Rowe,* 131 F. 2d 687 (C.A. 6, 1942); *Frasca v. Eubank,* 24 F.R.D. 268 (D.C.Pa., 1959); 1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 177, p. 666. The present case involves nothing more than the application of this rule of liberal construction to a particular set of facts; and it is submitted that the construction given to Rule 4(d)(1) by the Court of Appeals clearly was a natural rather than an artificial one, since both Petitioner and the manager resided in the Maracaibo Apartments.

II

There Is No Conflict of Decision

There is no decision in conflict with the rule announced in this case. In fact, the cases cited by Petitioner recognize

that Rule 4(d)(1) should be liberally construed to uphold service where notice of suit has been received by the defendant. It appears that Petitioner also accepts this as a correct statement of the law, although he quarrels with the result reached in this case.

III

There Is No Important Question of Federal Law

As hereinabove noted, this case involves nothing more than the application of a well accepted and generally recognized rule of construction to a particular fact situation. It does not involve any important question of federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 14th day of February, 1968, I served the foregoing Brief for Respondent in Opposition on Petitioner by depositing two (2) copies thereof in the United States mail, with proper postage affixed, addressed to Lawrence W. Anderson of Anderson, Henley, Shields, Bradford and Pritchard, 3100 Fidelity Union Tower, Dallas, Texas, 75201, one of Petitioner's attorneys of record.

W. B. West, III

Mitchell B. Booth